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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SPECIAL COPY

No. 80-5061

DENNIS O'CONNOR, et ux, Appellant,

v.

PALUDAN CORPORATION, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE

STATE OF NEVADA

APPELLANT'S OPPOSITION TO APPELLEE'S

MOTION TO DISMISS

DENNIS O'CONNOR and MARILYN O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121

Dated this 7th day of October, 1980.

Appellant-defendants in forma pauperis, pro se counsel

INDEX

Page

Appellant's Opposition To Appellee's Motion To Dismiss 1

Appellant's Motion To Proceed In Forma Pauperis Should Be Granted 1

Substantial Federal Questions Exist For Review 4

Conclusion 6

Cases:

Adkins v. DuPont Co., 335 U.S. 331 (1948) 4

Casey v. Musgrave, 72 Nev. 31 (1956) 6

Edwards v. Elliot, 88 U.S. 532 (1874) 4

Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916) 4

Musgrave v. Casey, 68 Nev. 471 (1951) 6

Parsons v. Bedford, 3 Pet. 433 (1830) 5

Sanguinetti v. Strecker, 577 P. 2d 404 (1978) 6

Walker v. Sauvient, 92 U.S. 90 (1875) 4

United States Supreme Court Rules:

Rule 16(4) 1

Rule 53 1

Supreme Court Practice, Fifth Edition 1

Nevada State Constitution:

Article I, Section 8 4

Federal Constitution:

Article I, Section 10, Clause 1 6

Article III, Section 2, Paragraph 3 5

Page

Article IV, Section 2 6

VII Amendment 6

Miscellaneous:

The Making of the American Republic, edited by Charles Callan Tansill, New Rochelle, New York: Arlington House (1927), Library of Congress No. 72-78484 5

IN THE

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APPELLANT'S OPPOSITION TO APPELLEE'S

MOTION TO DISMISS

Pursuant to rule 16(4) of the Supreme Court rules the appellant's, Dennis O'Connor and Marilyn O'Connor, moves this Court to deny the appellee's motion to dismiss on the grounds that the appellant's are indigent and without the funds to pay the costs of this appeal and have raised substantial constitutional questions for review.

APPELLANT'S MOTION TO PROCEED INFORMA PAUPERIS

SHOULD BE GRANTED

The appellee's have contended that the appellant's have erroneously cited rule 53 of the rules of this Court under which to proceed in forma pauperis. The appellant's believe rule 53 is indeed the correct rule and have relied on personal legal research notes and copies of federal forms as they appear in the Supreme Court Practice, fifth edition which had been available to them prior to July 1, 1980. However, the Nevada Supreme Court issued a directive that commencing July 1, 1980 laymen would no longer be given access to the state law library on an equal footing with attornies.

The appellant's received a Preliminary Injunction and Memorandum decision from the United States District Court of Nevada, CV-R-80-196, ECR, on September 29, 1980 enjoining and restraining the Nevada Supreme Court and all persons acting in concert with them from denying the appellant's access to the law library on an equal footing with attornies. However, the law library is sixty miles from the rural community in which the appellant's reside. Therefore, the appellant's have not had an opportunity to research the rules of practice of this Court prior to filing the above-entitled motion. Realizing that time is of the essence in submitting this motion to the Court, the appellant's must rely on the research notes which they have previously acquired and hereby make apologies for any errors which may be contained herein.

The appellant's filed a "bare bones" affidavit pursuant to the form and definition of the rules as they appear in the Supreme Court practice, fifth edition.

The appellee's have based the transparent opposition to the appellant's in forma pauperis petition on a denial so to proceed from the United States District Court of Nevada. The denial from the United States District Court of Nevada included untimely circumstances which no doubt contributed to the rejection of the in forma pauperis application on July 3, 1980. On March 12, 1980 the appellant's filed an amended affidavit(s) with the United States District Court in order to obtain a Preliminary and Permanent Injunction to restrain the Nevada Supreme Court from summarily dismissing the appellant's appeal in that Court. See Exhibit "A" attached hereto. Also on March 12, 1980 Federal District Court Judge Edward Reed apparently intended to recuse himself from the action. See Exhibit "B" attached hereto. However, the only case that was reassigned was CV-R-79-215, ECR which was commenced on September 28, 1979 by appellant O'Connor against several members of the Nevada state government and agencies. That action includes causes of action against Fallon City Attorney Mario Recanzone for conflicting his interests and convicting Mr. O'Connor of an ex post facto law while representing the defendant's, the Palludan Corporation, in a civil suit of which Mr. O'Connor was a plaintiff, case 12768, which appears in the record below. The suit also contains causes

of action against the Nevada State Bar Association and the Nevada Supreme Court for failing to investigate and order a corrected trial transcript from case 12768.

In May of 1979 and prior to Federal Judge Edward Reed taking the bench, the appellant's had sought the aid of one of his law partners to represent them in case 13059. After reviewing the trial transcript from case 12768 and considering the the fact that the judge that was at that time assigned to case 13059 was a former law partner of the law firm of Diehl, Recanzone, and Evans, the said attorney advised the appellant's that the only way he felt he could satsifactorily represent the appellant's would be before a jury. Whereas the appellant's did not have the funds for a jury deposit, the attorney refused to litigate the matter. It was at that time that the appellant's realized they would have to represent themselves.

The time lapse from the amended affidavit to proceed in forma pauperis being filed on March 12, 1980 and the subsequent denial on July 3, 1980 by Federal Judge Edward Reed was one-hundred and thirteen days and well after the dismissal of the appeal by the Nevada Supreme Court on April 25, 1980. The appellant's have concluded that CV-R-80-49, ECR was also transferred to the Las Vegas United States District Court of Nevada on March 12, 1980 and was not discovered and returned to Federal Judge Edward Reed until July 3, 1980. At that time, there was nothing much more to be done concerning the request for a Preliminary and Permanent Injunction and the informa pauperis application was denied.

The appellant's do not have nor have they had the funds with which to pay for this appeal. The appellant's do not have any assets or savings account and live modestly off of Mr. O'Connor's wages. City attorney Mario Recanzone has previously attached Mr. O'Connor's salary for 25% of his gross earnings. There is nothing precluding Mr. Recanzone from committing the same tort in the future, and the appellant's can not look forward to their future take home wages with any degree of certainty.

It is true that the appellant's are not yet in a position to where they must beg on a street corner with a tin cup nor are they on welfare. They

do however receive charitable assistance from Crippled Children's for their four-year-old daughter who was born with the congenital birth defect of hypothyroidism. The other family members are not covered by any form of health insurance.

For all of the aforementioned reasons, as well as the fact that the appellants's have been proceeeding in forma pauperis in the state courts with no objection from the appellee's, the appellant's respectfully request this Court to grant their in forma pauperis application. Adkins v. DuPont Co., 335 U.S. 331 (1948).

SUBSTANTIAL FEDERAL QUESTIONS EXIST FOR REVIEW

There are two substantial federal issues which exist in this appeal. The first is the right to pro se counsel in a civil suit before a state Supreme Court and the second is the right to a common law jury trial in a state civil action.

It was established in the appellant's jurisdictional statement heretofore filed with this Court that the framers of the Nevada state constitution did not intend for the words "and with counsel" to imply that it was obligatory on a litigant to employ counsel. The appellee's suggest that this right extends only to those persons involved in criminal proceedings. However, the framers made the same provision for those proceeding pro se in a civil action as well as criminal action in Article I, Section 8 of the Nevada state constitution which includes the following:

> ".....and in any trial, in any court whatever, the party accused shall be allowed to appear, and defend in person, and with counsel, as in civil actions."

The appellant's feel they have successfully unraveled the mystery of the Seventh Amendment of the federal constitution and it's intended application to the state courts.

The issue of the Seventh Amendment and how and if it relates to the state courts has forever been questioned and disputed. Edwards v. Elliot , 88 U.S. 532 (1874), Walker v. Sauvient, 92 U.S. 90 (1875), and Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916).

Yet, going back in time the high Court considered what was present to the minds of the framers of the amendment and it's general application to the states. Parsons v. Bedford, 3 Pet. 433 (1830).

The appellants have found what was present on the mind of Elbridge Gerry and suspect his strong determination to include the right to a common law jury trial in a civil action was due to his own personal experience or to an experience he witnessed.

The subject of the right to a common law jury trial in a civil action was first discussed at the federal convention on September 12, 1787 as recorded by John C. Payne in notes dictated to him by James Madison, The Making of the American Republic, edited by Charles Callan Tansill, New Rochelle, New York: Arlington House (1927) at p. 716:

> "Mr. WILLIAMSON, observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.
>
> Mr. GORHAM. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.
>
> Mr. GERRY urged the necessity of Juries to guard against corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.
>
> Col. MASON preceived the diffuculty mentioned by Mr. Gorham. The jury cases can not be specified. A general principal laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, and would Second a Motion if made for the purpose. It would give a great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.
>
> Mr. GERRY concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col. MASON seconded the motion.
>
> Mr. SHERMAN, was for securing the rights of the people where requisite. The State Declaration of Rights are not repealed by this Constitution; and being in force is sufficient. There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.
>
> Col. MASON. The Laws of the U.S. are to be paramount to State Bill of Rights. (Emphasis added)
>
> On the question for a Committee to prepare a Bill of Rights."

Three days later James Madison dictated the following at p. 733 of The Making of the American Republic, supra:

> "Article III, Section 2, Parag:3. Mr. PINKNEY & Mr. GERRY moved to annex

to the end, 'And a trial by jury shall be preserved as usual in civil cases.'

Mr. GORHAM. The Constitution of Juries is different in different States and the trial itself is usual in different cases in different States.

Mr. KING urged the same objections.

Gen. PINKNEY also. He thought such a clause in the Constitution would be pregnant with embarassments.

The motion was disagreed to nem: con:"

While Mr. Gerry did not succeed in annexing the right to a common law jury trial in a state civil action to Article III, Section 2, Parag. 3, it was later incorporated in the Federal Bill of Rights. The right to a common law jury trial is obviously a procedural civil right guaranteed to all citizens of the several states. The VII amendment of the federal constitution and it's application to the states is protected by Article VI, Section 2 of the Federal Constitution as verified by Col. Mason on September 12, 1787, supra. It is untenable to suggest that an individual is only protected from a corrupt federal judge as opposed to a a corrupt state judge. Mr. Gerry was paticularly concerned with the corruptibility of a state judge.

The double protection of a common law jury trial is described by Alexander Hamilton in the Federalist Paper, No. 83.

The Nevada state legislature has made provisions for contractual agreements pursuant to Article I, Section 10, Clause 1 of the federal constitution yet the state judicary does not recognize these laws with any degree of consistency. Accordingly, the vagueness concerning the right to a common law jury trial in a civil action has been the cause of great misunderstandings and anguish for attornies as well as litigants. Musgrave v. Casey, 68 Nev. 471 at 475 - 479 (1951). Also see a subsequent related case, Casey v. Musgrave, 72 Nev. 31 (1956).

Yet, there does seem to be some form of common law jury trial in a civil case within the state of Nevada. Sanguinetti v. Strecker, 577 P. 2d 404 (1978).

CONCLUSION

The appellant's have been proceeding in forma pauperis in the state

district and Supreme courts since October 4, 1979 without any objection from the appellee's. The appellee's have raised this opposition out of desperation only now that the case is out of the state of Nevada and it seems remotely conceivable that the appellant's might receive the long awaited for due process and equal protection of the laws. There is absolutely no way the appellant's could pay for the costs of this appeal as their credit is ruined and their debts and living expenses far exceed their income.

This Court must now remedy the injustice which has fallen on citizens of certain states over the past one-hundred and ninety-two years who have been denied their common law civil right to a jury trial in a property dispute. The Court must also consider the fate of the future citizens of this country who might otherwise suffer the loss of this federally protected civil right.

For all of the aforementioned reasons, the appellant's respectfully request this Honorable Court to deny the appellee's motion to dismiss as the need for plenary review of the action below is indisputable.

Dated this 7TH day of October, 1980.

Respectfully submitted,

DENNIS O'CONNOR

MARILYN O'CONNOR

Appellant-defebdants, in forma pauperis and pro se counsel
870 Soda Lake Road
Fallon, Nevada 89406

DENNIS and MARILYN O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121

Plaintiffs in Pro Per

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

DENNIS and MARILYN O'CONNOR, husband and wife, Plaintiffs, vs. THE NEVADA SUPREME COURT, et al., Defendants.	Case No. CV-R-80-49ECR AMENDED AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPRIS

STATE OF NEVADA) ss.
COUNTY OF WASHOE)

DENNIS and MARILYN O'CONNOR, being first duly sworn, deposes and says:

That they are the plaintiffs in the above-entitled action; that in support of their amended motion to proceed in forma paupris without being required to prepay fees, costs or give security therefor; we state that because of our poverty we are unable to pay the costs or give security therefor; that we believe we are entitled to redress; and the issues which we desire to present the Court are the following: the unconstitutionality of rule 38 (d) of the Nevada Rules of Civil Procedure as well as rule (s) 24 in that they do not make provisions for waiver of fees for deposit of jury for those proceeding in forma paupris. The plaintiffs have been denied the

Exhibit "A-1" (consisting of 5 pages)

VII amendment right of the Federal Constitution to a common law jury trial as Nevada law requires a deposit be made by the litigant requesting a jury trial. Plaintiffs were granted an informa paupris motion yet were not given a common law jury trial as they had requested. Plaintiffs also question the constitutionality of the state charging paticularly for a common law jury.as the state cannot charge for the enjoyment of a right guaranteed by the Federal Constitution. Murdock vs. Pennsylvania, 319 U.S. 105.

That we further swear that the responses which we have made to the questions and instructions below relating to our ability to pay the costs of the motion for a preliminary and permanent injunction are true.

1. Are you presently employed?

Yes, Mr. O'Connor is presently employed on a part-time basis. Mrs. O'Connor is not employed. She is a full-time homemaker for which she receives no salary. The needs of her four-year-old daughter require that she stay at home. Mr. O'Connor makes an hourly wage of $3.75 plus tips. However, this is not full-time work as it is the policy of his employer to send the employees home if their is no business. This happens quite frequently. Mr. O'Connor has attempted to obtain a second job to supplement his family's income at such hotels as the Ponderosa and Sahara-Reno but was advised that these hotels were laying-off employees rather than hiring any.

The plaintiffs would agree to inform the Court of any changes for the better in their income and perhaps pay the Court at a later late if it is so ordered for the fees which would now be waived due to plaintiffs poverty.

The name and address of Mr. O'Connor's employer is Sierra

Sid's Casino, 200 North McCarran Blvd., Sparks, Nevada 89431.

The plaintiffs current debts exceed their income of $800.00 per month give or take a few hours depending on the business at Sierra Sid's. This $800.00 is take-home pay and includes the following expenditures:

House payment (Payment includes taxes, approximate value of $40,000.00 of which the balance owing is $35,290.00)	-	$319.00
Household utilities (Gas and electric)	-	90.00
Telephone	-	15.00
Security National Bank (Auto loan, balance owing of $1338.31 is also it's approximate value, 1975 toyota landcruiser)	-	121.76
Insurance (auto)	-	77.00
Gasoline	-	57.00
Woodland Medical Clinic (Balance owing of $44.10)	-	10.00
Sears (minimum partial payment on tires and school clothes, the balance owing of $775.00)	-	25.00
	Total	$714.76

The balance of plaintiffs income is spent on food and medicine. Mr. O'Connor frequently sleeps at the trailer of a relati in Reno to cut down on the expenditure of gasoline.

The plaintiffs do not have any credit cards due to their inability to pay. They do make erratic minimum payments to Master C and Shell Oil Company on the balances they have with those companies prior to their returning of their credit cards. Most of those purchases were for gasoline. The plaintiffs do not have any luxuary or frivolous payments such as those for furniture, club memberships, or the like.

The plaintiffs also have outstanding debts from their previously-owned pizza business. These creditors are not receiving any payments but have accepted plaintiffs good-faith intentions

to pay at the time that justice may prevail, if in fact it ever does, or if plaintiffs financial status improves. These debts include a $10,000.00 plus interest commercial loan with Security National Bank, a $3,000.00 debt to Silver Valley Foods of Carson City for pizza food supplies, a $350.00 debt to Continental Foods, $300.00 to beverage supply companies, and approximately $6,000.00 in judgments against plaintiffs which are nullities but none-the-less can be executed in the state of Nevada. These void judgments are the reason for the plaintiffs request to proceed in forma paupris for a temporary and permanent injunction due to a denial of due process and equal protection of the laws.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

a. No, neither of the plaintiffs have received any of the above-mentioned income. The grandparents have given plaintiffs money to get Christmas gifts for the grandchildren. However, this was not income and Mr. and Mrs. O'Connor did not receive any of the money for themselves nor did they spend one penny of it on themselves.

3. Do you own any cash or checking or savings accounts?

a. The plaintiffs have one joint checking account which maintains a minimum balance. This is the only checking account either of the plaintiffs maintain either jointly or separately. Neither of the plaintiffs have a joint or separate savings or cash account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. The plaintiffs do not actually own but are making payments on their home which is homesteaded so that their children may have security. Other than that, neither of the plaintiffs own any real estate.

b. The plaintiffs jointly own a 1976 Honda which has no value as it does not run due to a blown engine which would cost $900.00 to fix. The plaintiffs also own a 1965 Buick which also is valueless due to the fact that it is fifteen years old.

5. List the persons who are dependent on you for support and state your relationship to those persons.

a. John Kelly O'Connor, the plaintiffs nine-year-old son.

b. Stephanie Lynne O'Connor, four-year-old daughter of the plaintiffs.

c. Mrs. O'Connor is dependent on Mr. O'Connor for her support.

The plaintiffs and their children are going without a much needed health insurance policy due to the high cost of $80.00 per month.

Any valuable property that the plaintiffs may have had at one time was owned by the bank and they have repossed it.

We understand that a false statement or answer to any question in this affidavit will subject us to penalities of perjury.

Dated: this 12th day of March, 1980.

Signed:

DENNIS O'CONNOR

MARILYN O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406
Plaintiffs in Pro Per

SUBSCRIBED AND SWORN to before me this 12th day of March, 1980.

NOTARY PUBLIC

[illegible] Nevada
[illegible] 24, 1983

MARILYN O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121

Plaintiff in Pro Per

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

DENNIS and MARILYN O'CONNOR, husband and wife, Plaintiffs, vs. THE NEVADA SUPREME COURT, et al., Defendants.	Case No. CV-R-80-49-ECR SUPPLEMENTAL AMENDED AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPRIS

STATE OF NEVADA) ss.
COUNTY OF WASHOE)

MARILYN O'CONNOR, being first duly sworn, deposes and says: That I am one of the plaintiffs in the above-named action. That I am filing a joint affidavit with my husband, DENNIS O'CONNOR, herewith as well as this supplemental amended affidavit herein.

That I am the wife of DENNIS O'CONNOR. That his debts are my debts and visa versa, and his income is my income and visa versa. That I do not have any separate income, savings or checking account, or valuables apart from my husbands.

That my family's diet consists mainly of cereal, soup, sandwiches, taco's and chicken, due to our low-budget.

That my husband and I neither one spend money on cigarettes, liquor, or other extravagances.

Exhibit "A-2" (consisiting of 2 pages)

That I am not employed nor am I skilled at any occupation That my minor daughter must have daily medication and needs me to care for her.

That I believe that we are entitled to redress and file t supplemental affidavit in support of motion to proceed in forma paupris due to our poverty and the fact that we cannot pay the costs or give the security therfor of a preliminary and permanent injunction against the above-named defendants.

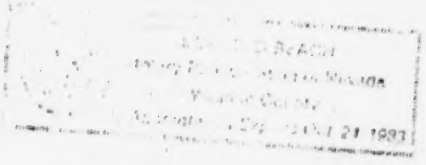
Dated: this 12th day of March, 1980. Signed:

Marilyn O'Connor

MARILYN O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121
Plaintiff in Pro Per

SUBSCRIBED AND SWORN to before me this 12th day of March, 1980.

Notary Public



FOR THE DISTRICT OF NEVADA
RENO, NEVADA

C.L No. CV-R-79-215-ECR

MINUTES OF COURT

DENNIS L. O'CONNOR

FILED

DATE: MARCH 12, 1980

VS.

STATE OF NEVADA, et al.

MAR 12 1980

CLERK, U. S. DISTRICT COURT
DISTRICT OF NEVADA
BY: Mary Goodwin

PRESENT: HONORABLE EDWARD C. REED, JR. U. S. DISTRICT JUDGE

DEPUTY CLERK: MARY GOODWIN REPORTER: N/A

COUNSEL FOR PLAINTIFF(S): N/A

COUNSEL FOR DEFENDANT(S): N/A

PROCEEDINGS

MINUTE ORDER IN CHAMBERS XX

It appearing to the Court that the Court's previous law firm was consulted by plaintiff, and that the Court should recuse itself, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS

ORDERED that this case is assigned to Chief Judge Roger D. Foley for reassignment.

Exhibit "B"

CAROL C. FITZGERALD, CLERK

BY: Mary Goodwin DEPUTY